Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 332.

ADAMS EXPRESS COMPANY, *Plaintiff in Error*,

vs.

THE COMMONWEALTH OF KENTUCKY.

In Error to the Court of Appeals of Kentucky.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case does not differ in any material respect from case No. 331, between the same parties, which is to be heard at the same time, and we therefore refer to our brief in that case.

Stripped of legal verbiage the indictment charged that the Adams Express Company, being engaged in the business of a carrier of goods by the method commonly known as express, carried for and delivered to J. D. Main, at Barbourville, Kentucky, a C. O. D. shipment of intoxicating liquor of less than five gallons, and collected the charges, "said shipment

and delivery being made and done at the time by said J. A. Owens, William Dedden and Adams Express Company in the usual course of business of said Adams Express Company." The indictment alleged that the place from which the shipment was made and the name of the owner of the liquor, "for whom the same was carried and delivered as aforesaid," were unknown to the grand jury, but it was stipulated at the trial that the place of shipment was Cincinnati, Ohio, and that the liquor was received and carried by the defendant in the usual course of its business as a common carrier (Rec. 3, 12, 14). The consignee, Main, testified that he had not ordered the liquor (Rec. 7), but there was no evidence that plaintiff in error or its agent knew that it had not been ordered.

These are all the material facts. The case was tried without a jury. The Adams Express Company was adjudged guilty and fined $60. The case was dismissed as to the agent. The bill of exceptions recites that it contains all the evidence (Rec. 5).

At the conclusion of the evidence the defendant moved the court to find that it was not guilty, on the ground that the transaction embraced in the indictment was interstate commerce. The court overruled the motion. (Rec. 15, 16.)

In rendering judgment the trial court said (Rec. 16):

"It was claimed by the company that it had no knowledge of the fact that there was no contract between the seller and the buyer; that it first received the knowledge of this fact on the trial of this case, and so far as the evidence shows this is true; still the court thinks that it should be bound in this case to know the facts that actually existed, and that it must be held to know the facts previously existing between the buyer and seller, if any; and even if the product delivered in this case was protected by interstate commerce, still when the company, as in this case, becomes the shipper and deliverer for a company that has no contract, the company then becomes a mere seller of liquor at the point of delivery.

To hold otherwise would be to allow this company through its office at Barbourville to become a common retail dealer of liquor in our midst, and thus violate the law, and make it an exception to the general rule, which prevents other persons and corporations from selling liquors in our midst."

The plaintiff in error filed its motion for a new trial assigning as grounds therefor that:

"The facts in evidence show that the shipment of the whiskey was received by the defendant as a common carrier in Cincinnati, Ohio, in the usual course of business, and delivered directly to the witness, J. D. Main, as a common carrier in the usual course of business in Barbourville, Kentucky, and was therefore covered by interstate commerce regulations." (Rec. 4, 5.)

On the overruling of the motion, the case was appealed to the court of appeals where the judgment was affirmed.

I.

The court of appeals decided that what defendant did as a common carrier was not interstate commerce, because there was no antecedent contract of sale between the shipper and the consignee, and that defendant's good faith was no excuse.

The court of appeals said that "the first and crucial question in this case" was "whether or not the shipment and delivery of the whiskey was an act of interstate commerce" (R. 21), and held that it was not, because there was no antecedent contract of sale between the shipper and the consignee (R. 22). The court said that no one could dispute "that the transaction, so far as the consignor was concerned, was illegitimate and in violation of the law * * * the same as if he had brought the whiskey himself to Barbourville, and there sold it to Main. This being true the transaction

was not interstate commerce." (R. 22, 23.) The court then said (R. 23):

"The Commonwealth proved facts which, of themselves, established the guilt of the defendant company. It showed the existence of the prohibition law in Knox county, the delivery of liquor by the defendant to Main, and the payment of the price by the latter to the company's agent. These facts constituted an offense under the prohibition laws prevailing at the place of sale, and the defendant is guilty unless it has a defense which takes the transaction from without the operation of the State statute. It seeks to do this by alleging that the transaction was interstate commerce. The burden to establish this fact is upon the defendant. There can be no doubt of the soundness of this proposition. When the Commonwealth has established facts which show the guilt of the accused, if the defendant seeks to avoid the legal effect of this evidence, it must do it to the satisfaction of the court or jury, or else be condemned. Did the defendant show that the transaction, out of which grew the offense with which it stood charged, was interstate commerce? The answer to this must be in the negative. It simply showed that it received in Cincinnati, in the usual course of business, which means no more, as we understand it, than that the goods were shipped in the ordinary way, whiskey consigned to J. D. Main in Barbourville, Kentucky; but this does not constitute interstate commerce; unless there is a bona fide shipment to a real consignee in Barbourville, the transaction was not interstate commerce, but a mere simulacrum of interstate commerce."

The court said that in "very substance" the consignor "simply appointed the Adams Express Company as his agent to find for him a purchaser in Knox county for a gallon of whiskey on a given commission," and thought it immaterial that the defendant acted in good faith and without guilty knowledge, saying (R. 23):

"The defendant can not say that it did not know the transaction was an illegitimate one, or that it believed it was a bona fide shipment. It must show in defense of its otherwise illegal act in Knox county, that the State law did not apply

to it at that time, because what it did was in pursuance of an act of interstate commerce."

The court after saying again that "in order to escape conviction, the burden was upon the defendant to show that its acts were in pursuance of a contract of interstate commerce," meaning thereby an antecedent contract of sale between the consignor and consignee, gave the following illustration to support its decision that the good faith of the defendant was immaterial (R. 24):

"Suppose, instead of the defense being interstate commerce, it had been license, and the appellant had undertaken to defend the sale in question by showing that it was the agent of the seller, and that the latter was duly licensed to carry on the business; would it be sufficient to show that it believed its principal was licensed, and would the court hear such evidence? On the contrary, in order to defend, would it not be imperative upon it to show, *not that it honestly believed*, but that it was the agent of a licensed dealer? In the case at bar the defendant undertakes to show that it was the agent of the consignor, and *that it believed* the consignor's acts were legitimate acts of interstate commerce. Is this a better excuse than the one supposed? We think not. Appellant can not shelter itself under its common-law duty devolving upon a common carrier of goods. There is no common-law duty devolving upon a common carrier to act as the collecting agent of the consignor; that is a matter of private contract, and one which the carrier may enter into, or refuse, at its option. When it does make such a contract, it stands with reference to it just as any other agent."

II.

The animadversions of the court of appeals are not based on evidence, and are immaterial in view of the court's decision that the carrier's good faith and honest belief are no excuse.

The court having thus decided that an express company which transports whiskey C. O. D., in the regular course of business, from Ohio to Kentucky, is guilty of an offense under the statutes of Kentucky, unless it can prove affirmatively, that the consignee ordered the whiskey, and that it is not sufficient to show "that it did not know the transaction was an illegitimate one, or that it believed it was a bona fide shipment," and that the plaintiff in error was therefore properly convicted, said that it was "forced to the conclusion that the agents of the defendant corporation at Barbourville knew of the illegality of the system they were helping to conduct, and that the corporation itself was the accomplice, for pay, of the criminal consignors." (R. 25.)

The court conceded that there was "no direct evidence upon which one could lay his finger and say this showed knowledge or that showed knowledge on the part of the express company that the business in which it was engaged was a criminal one," but thought that "taking the evidence as a whole, and looking at the circumstances from the point of view in Barbourville, there was enough to show that the defendant was bound to know that the consignors were carrying on systematically a criminal business, and that the names given as consignees to the various packages of whiskey shipped were fictitious" (R. 25). The court said that Barbourville was a small town, and that it was "a matter of common knowledge that in a small town there are no secrets. Every man knows every other man, what he does, how he conducts himself and what are his habits," and that "the system under consideration had been carried on a long time" (R. 25).

These observations of the court are immaterial so far as the federal question is concerned. The state court has decided that question by holding that the transaction in which the express company engaged was not interstate commerce, because there was no antecedent contract of sale between the shipper and the consignee, and that the defendant's ignorance and good faith are immaterial. But the observations are not justified by any evidence in the case.

There was no testimony that the defendant or its agent at Barbourville knew or had reason to believe that the consignee had not ordered the whiskey. He had received and paid for many similar C. O. D. packages during the preceding year, sometimes calling at the express office for them, and sometimes getting George Tie, a local expressman, to call for them and pay the charges (R. 9, 10, 11). There was no testimony that he ever informed the agent of the express company that he had not ordered the whiskey so delivered to him. Apparently he did order that which was received from J. D. Dantz, from whom, he says, he generally got his whiskey (R. 11). He regarded the product of the White Oak Distillery Company, from which he thinks the shipment at bar came, as "inferior whiskey," and is sure that he never ordered it (R. 10). He appears to have been in active correspondence with the concern. He testifies that he "notified them not to ship *in my name*" (R. 8), and that he got Jesse Tuggle "to notify them not to ship any more" (R. 9), and that he and Tom Wilson and Tom Gilbert "notified the parties not to ship any more *in my name*" (R. 9). But his scheme to get whiskey in a fictitious name failed. He admits that Owens, defendant's agent, told him that "he could only deliver boxes to the man to whom they were addressed" and that he never received a box from the express company, which was not addressed to him (R. 11).

The commonwealth stipulated at the trial that the

package on which the indictment was based "was delivered by the Adams Express Company and received by it in its office in Cincinnati in the usual course of business as a common carrier" (R. 12, 3), and the trial judge in delivering his opinion, said that the evidence showed, and the fact was, that the defendant learned on the trial, for the first time, that the whiskey had not been ordered (R. 16). He gave judgment because he thought that the defendant "should be bound in this case to know the facts that actually existed, and must be held to know the facts previously existing between the buyer and the seller, if any" (R. 16).

The court of appeals said that the evidence showed that the express company "often had as many as fifty gallons of whiskey on hand at one time consigned to various parties under the same system" (R. 21), but there was no evidence that any of the whiskey referred to had not been ordered.

The court of appeals also said "that the remittances were to be made to a lock box instead of to a named firm" (R. 25). There was no evidence to that effect. The court probably had in mind the testimony of the consignee that in the box containing the whiskey he found envelopes addressed to a lock box at Cincinnati and order blanks (R. 6, 8). Apparently they were envelopes intended for the consignee's use to enable him to order more whiskey. So far as the express company was concerned, it returned the C. O. D. charges to the shipper in the company's C. O. D. wrapper (R. 13, 15).

III.

If what defendant did in executing a contract made in Ohio, in good faith and in the regular course of business, to carry whiskey C. O. D. to Kentucky, was interstate commerce, it is immaterial on what ground the state court denies the protection of the Constitution of the United States.

In this court it is immaterial, either on the question of its jurisdiction or on the merits, whether the decision of the court of appeals of Kentucky that the transaction was not interstate commerce, is reached by applying an erroneous rule of law, or by assuming facts not in evidence.

Nor is it material whether the conviction is sustained by the state court under the C. O. D. statute (sub section 4 of section 2557B), or under the general local option law (section 2557. In case No. 331, where the indictment was substantially the same, the court of appeals held that the conviction was under sub-section 4 of section 2557B, while in this case it held that the conviction was under the general local option law, and that the reference in the indictment to the C. O. D. law (sub-section 4 of section 2557B) was surplusage. If either statute is so applied by the state court as to regulate the business of interstate carriers, by requiring them to ascertain at their peril whether goods offered for transportation in another state have been contracted for by the consignee, it is repugnant to the constitution of the United States.

Sub-section 4 of section 2557B fixes no penalty. The fine imposed is provided for by the cognate section of the local option law, being section 2557, Kentucky Statutes, 1905, which reads as follows:

Section 2557: "After the entry of the certificate of the canvassing board as above provided for, in the order book of the county court, if the vote was given against the sale,

barter or loan of spirituous, vinous or malt liquors in the said county, city, town, district or precinct, as the case may be [There seems to be an omission here—Ed.] to any person, except as hereinafter provided; and any person who shall sell, barter or loan, directly or indirectly, any such liquors in said county, city, town, district or precinct shall upon conviction, be fined not less than sixty nor more than one hundred dollars, or be confined in the county jail for not less than ten nor more than forty days, or both so fined and imprisoned in the discretion of the court or jury for each offense; and any person who knowingly furnishes or rents a house, room, wagon or any conveyance or thing, in which spirituous, vinous or malt liquors are sold, bartered or loaned, in violation of this act, shall, upon conviction thereof, be fined not less than sixty nor more than one hundred dollars, and the house, wagon, vehicle, land or other thing in which the liquors were sold, bartered or loaned shall be liable for all fines adjudged against the person selling, bartering or loaning the same."

This section was referred to in the indictment. In case No. 331 the court of appeals considered that it had no bearing except as fixing the amount of fine (Rec. 28).

The other acts mentioned in the indictment are special acts forbidding the sale of liquor in Laurel and Knox counties.

We respectfully submit that the judgment should be reversed.

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Counsel for the plaintiff in error.

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Additional Brief for the Plaintiffs in Error.

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I.

No question of fraud was submitted to the jury or passed upon by them.

In No. 331 the jury were instructed to find the defendant guilty if it delivered the whiskey to Meece and "received any pay whatever for its services in that behalf." Instruction No. 1, R. 24, 25. The court did not even qualify the instruction by saying that the absence of an order for the whiskey by the consignee, or the collection of the C.O.D. charges by the defendant, were material. The instruction

was absolute to convict if the defendant delivered the whiskey and received pay for its services.

In No. 583 the court charged the jury that "a delivery of said whiskey in Hodgensville C. O. D. was a sale, unless said whiskey had been ordered by said Graham [the consignee] previously of the consignor M. E. Stone" (Instruction No. 2, R. 15, 16), and the Court of Appeals said that in its "view of the law the instructions were proper." R. 31.

In No. 332, which was tried without a jury, the Commonwealth stipulated that the whiskey was received and delivered by the defendant "in the usual course of business as a common carrier" (R. 12), and the trial judge in delivering judgment said that, so far as the evidence showed, the defendant had no knowledge of the fact that there was no contract of sale between the shipper and the consignee until it was developed at the trial, R. 16. The Court of Appeals held that the defendant's good faith was immaterial, saying:

"The defendant can not say that it did not know the transaction was an illegitimate one, or that it believed it was a bona fide shipment," R. 23.

The court said that the defendant could escape conviction only by proving an antecedent contract of sale, and that the burden of such proof was on the defendant.

In both 331 and 332 the indictment alleged that the defendant was engaged in business as a carrier, that the shipment and delivery were in the usual course of such business, and that the whiskey was carried *for* and delivered to the consignee (p. 2 of each record).

II.

In Delamater vs. The State of South Dakota, decided March 11, 1907, this court held that "the business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or

where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped." The decision was placed upon the ground that the business was carried on wholly within the borders of the state and that the statute did not burden any right secured by the Constitution, because there was no right under the Wilson act to sell whiskey in South Dakota. This ground of decision does not apply to a state statute which attempts to regulate a business which is carried on in two states, and embraces the transportation of an article of commerce from one to the other.

III.

The Wilson act does not authorize state regulation of the operations of the carrier at all, either in receiving the liquor in the state of origin, or in transporting it to the state of destination, or in delivering it there, for the state statute can come into play only after delivery, as the court has repeatedly held. The business of an interstate carrier can not be subjected at any stage to state regulation under the Wilson act. In Rhodes vs. Iowa, 170 U. S. 412, 415, Mr. Justice White referring to Bowman's case said:

"It was decided that the transportation of merchandise from one state into and across another was interstate commerce, and was protected from the operation of state laws from the moment of shipment whilst in transit and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned."

And again at page 426:

"We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

A state statute can not therefore prohibit the payment of C.O.D. charges on an interstate shipment, for that act precedes or accompanies delivery, and takes place before the time arrives when the state legislation authorized by the Wilson act can come into play. The statute of Kentucky which forbids an interstate carrier to deliver a C. O. D. package and makes the carrier's reception of the C. O. D. charges an offense, is therefore not authorized by the Wilson act. Congress did not intend by that act to authorize the states to regulate the business or operations of an interstate carrier. That is a business which involves "interstate commerce in its fundamental aspect," and imports "in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states," to use the words of Mr. Justice White in Rhodes vs. Iowa, 170 U. S. at page 424.

At page 422 he says that the Wilson act "manifests no purpose to confer upon the states the power to give their statutes an extra territorial operation so as to subject persons and property beyond their borders to the restraints of their laws. If the act of Congress be construed as reaching the contract for interstate shipment made in another state, the necessary effect must be to give to the laws of the several states extra territorial operation, for, as held in the Bowman case, the inevitable consequence of allowing a state law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the state for such shipments. If the construction claimed be upheld, it would be in the power of each state to compel every interstate commerce train to stop before crossing its borders, and discharge its freight, lest by crossing the line it might carry within the state merchandise of the character named covered by the inhibitions of a state statute."

In Bowman vs. Chicago & Northwestern Railway Company, 125 U. S. 465, 486, Mr. Justice Matthews after quoting a passage from the opinion in County of Mobile vs. Kimball, 102 U. S. 691, in which Mr. Justice Field declared that

"there can be only one system of rules applicable alike to the whole country" for the regulation of commerce as defined by this court, and "that the authority which can act for the whole country can alone adopt such a system" and that "action upon it by separate states is not therefore permissible," said:

"The principle thus announced has a more obvious application to the circumstances of such a case as the present, when it is considered that the law of the state of Iowa under consideration, while it professes to regulate the conduct of carriers engaged in transportation within the limits of that state, nevertheless materially affects, if allowed to operate, the conduct of such carriers, both as respects their rights and obligations, in every other state into or through which they pass in the prosecution of their business of interstate transportation. In the present case, the defendant is sued as a common carrier in the state of Illinois, and the breach of duty alleged against it is a violation of the law of that state in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defence a law of the state of Iowa, which forbids the delivery of such goods within that state. Has the law of Iowa any extra territorial force which does not belong to the law of the state of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter?" 125 U. S. 486.

IV.

C.O.D. means two things. In the first place it is a direction to the carrier not to deliver the goods unless the consignee pays certain money, and the carrier becomes liable to the shipper if it disobeys the direction. Can the State of Kentucky make it an offense for a carrier to receive and obey such direction given in Ohio with respect to an interstate shipment? In the second place a C.O.D. shipment involves a contract on the part of the carrier, for which it gets

compensation, to carry the money, if received from the consignee, back to the shipper. Can the State of Kentucky forbid an interstate carrier from making a contract in Ohio to carry lawful money of the United States from Kentucky to Ohio, and condemn the execution of that contract by the carrier as a criminal offense?

A large part of the commerce of the United States is carried C. O. D. By long established usage it has become a part of the business of express companies. Congress did not intend to place its regulation in the hands of the states. On the contrary it is placed under the control of the Interstate Commerce Commission.

In Crescent Liquor Company vs. Platt, 148 Fed. 894, Circuit Judge Goff granted an injunction to compel an express company to carry liquor C. O. D.

V.

Adams Express Company vs. Iowa, 196 U. S. 147, involved the following statutes of Iowa, which made it an offense to sell intoxicating liquor or to use a building for the purpose of selling intoxicating liquors therein. (Annotated Code of Iowa, 1897, Chap. 6, Tit. XII, p. 818, as amended April 6, 1900 Laws of Iowa, 28 G. A. 1900, p. 59.)

Sec. 2382. "No one by himself, clerk, servant, employee or agent shall, for himself, or any person else, directly or indirectly, or upon any pretense or by any device, manufacture, sell, exchange barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, or keep for sale any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or solicit, take, or accept any order for the purchase, sale, shipment or delivery of any such liquor, or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped, or own, keep, or be in any way concerned, engaged or em-

ployed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; and any clerk, servant, employee or agent engaged or aiding in any violation of this chapter shall be charged and convicted as principal, provided that nothing herein shall prohibit traveling salesmen soliciting orders for the purchase, sale, and shipment of intoxicating liquors from persons legally authorized to sell or dispense the same."

Sec. 2383. "Whoever is found guilty of violating any of the provisions of the preceding section, for the first offense shall pay a fine of not less than fifty nor more than one hundred dollars, and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense he shall pay upon conviction thereof a fine of not less than three hundred dollars nor more than five hundred dollars, and costs of prosecution, or be imprisoned in the county jail not to exceed six months."

Sec. 2384. "Whoever shall erect, establish, continue or use any building, erection or place for any of the purposes herein prohibited, is guilty of a nuisance, and upon conviction shall pay a fine of not less than three hundred nor more than one thousand dollars and costs of prosecution, which shall include a reasonable attorney's fee to be taxed by the court, and stand committed to the county jail until such fine and costs are paid, and the building, erection or place, or the ground itself, in or upon which such unlawful manufacture, or sale, or keeping with intent to sell, use or give away said liquors is carried on or continued or exists, and the furniture, fixtures, vessels and contents are also declared a nuisance, and in addition to the penalties hereinbefore affixed, shall be abated as hereinafter provided."

The Adams Express Company was indicted and convicted in the state court for maintaining a nuisance, in violation of the foregoing section 2384. The indictment charged in substance that the Company, between July and December, 1900, at St. Charles, Madison county, Iowa, used a building for the purpose of selling intoxicating liquors therein, contrary to

law, and that it owned and kept therein intoxicating liquor with the intent unlawfully to sell the same within the state contrary to the statute.

The court charged the jury as follows, as appears at p. 6 of the record in this court (No. 82, October Term, 1904):

"You are further instructed that if you find from the evidence beyond a reasonable doubt that it [the defendant] received and kept at its office building in St. Charles, Madison county, Iowa, packages of intoxicating liquor, carried by it from other points as a common carrier, that said packages of liquor were marked C. O. D., and the price of said liquors marked thereon, and you further find from the evidence beyond a reasonable doubt, that the liquors so kept and held by it with intent to deliver same at said place to the party to whom it was consigned upon the payment and collection of the purchase price of the said intoxicating liquors, then and in that event, you are instructed that such delivery and collection of said purchase price of said intoxicating liquor would constitute a sale of said liquor at the place of its delivery and the collection of the purchase price thereof, and if you shall find from the evidence beyond a reasonable doubt, that intoxicating liquors were kept and held by the defendant at its office in St. Charles, Madison county, Iowa, for delivery at said place on the payment of the purchase price thereof, and that said acts were committed by the defendant within three years next prior to the 7th day of December, 1900, then the defendant is guilty of the crime of nuisance as charged in the indictment."

The Iowa statute was substantially the same as the Kentucky Statute (Sec. 2557), and the instruction of the Iowa court to the jury was substantially the same as the instructions of the Kentucky court in Nos. 331 and 583. In other words both courts held that an express company which delivered liquor C. O. D. was guilty of making a sale thereof at the place of delivery, and that is declared to be the effect of the transaction by section 2557B 4 of the Kentucky Statute. In reversing the judgment of the Iowa court this court

therefore necessarily held in effect that it could not be said that an express company which carried liquor C. O. D. into Iowa made a sale of it in that state in violation of the local law; and that is precisely what we ask the court to rule in the cases at bar.

The fact that the whiskey was not ordered by the consignees in the cases at bar is not material, for if the plaintiffs in error acted in good faith, and in the regular course of their business as common carriers, it can not be said of them here any more than in the Iowa cases that they were guilty of making unlawful sales of the liquor, since their only connection with the transaction was that of common carrier.

As matter of fact there was no evidence in the Iowa case against the Adams Express Company that the consignee had ordered the whiskey. It was stipulated, as appears at page 4 of the record in that case, that the goods "were shipped upon an order which had been sent to the consignor by a traveling agent for consignor," but there was no proof that the consignee had in fact given an order to the traveling agent, and in that respect the case was similar to No. 583, where there was an order the genuineness of which the consignee disputed.

The assumption of jurisdiction by this court in the Iowa cases, and its reversal of the convictions, necessarily involved the decision that what the express companies did in carrying liquor C. O. D. into that State was interstate commerce, and could not be justly denounced as the making of sales in violation of the local law. That is what we ask the court to say in the cases at bar.

In State vs. Cairns, 64 Kans. 782, Cairns, who was agent of the Wells, Fargo Express Company, was convicted of selling intoxicating liquors. The Supreme Court of Kansas reversed the conviction, stating the question before it thus:

"Is the agent of an express company or other common carrier for hire, who in good faith delivers goods carried by his principal, consigned C. O. D., and collects and returns the charges thereon, guilty of selling intoxicating liquors to the party to whom delivery is made, even though he knows the goods so consigned and delivered to be intoxicating liquors."

A similar decision of the Texas Criminal Court of Appeals is set out at length at pages 28 and 29 of our brief in No. 331.

Respectfully submitted,

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